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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RICKY RIVERA et al., Defendants and Appellants.	B204819 (Los Angeles County Super. Ct. No. YA063087)

APPEALS from judgments of the Superior Court of Los Angeles County. John V. Meigs, Judge. Judgments affirmed as modified.

Marilee Marshall, under appointment by the Court of Appeal, for Defendant and Appellant Ricky Rivera.

Murray A. Rosenberg, under appointment by the Court of Appeal, for Defendant and Appellant Luis Avalos.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lawrence M. Daniels and Yun K. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted appellants Ricky Rivera (Rivera) and Luis Avalos (Avalos) of shooting at an occupied building (Pen. Code, § 246)[1] (count 1), assault by means of assault weapon on John Doe (§ 245, subd. (a)(3)) (count 2), assault with a firearm on Lonnie Hunter (Hunter) (§ 245, subd. (a)(2)) (count 3), shooting at an uninhabited dwelling (§ 247, subd. (b)) (count 6), and willful, deliberate, and premeditated attempted murder of Lonnie Hunter (§§ 664, 187, subd. (a)) (count 7). Avalos was also convicted of evading an officer with willful disregard (Veh. Code, § 2800.2, subd. (a)) (count 5).

With respect to Rivera, the jury found true the allegation that in the commission of the assault in count 3, he personally used a firearm (§§ 1203.06, subd. (a)(1), 12022.5, subd. (a)) and that he personally inflicted great bodily injury (§ 12022.7, subd. (a)). The jury also found true the allegation that in the commission of count 7, Rivera personally discharged a firearm causing great bodily injury (§ 12022.53, subds. (c), (d)). The trial court found that Rivera had served three prior prison terms within the meaning of section 667.5, subdivision (b). The jury found true the allegation that Avalos personally used an AK-47 in the commission of count 2 (§§ 1203.06, subd. (a)(1), 12022.5, subd. (a), 12022.5).

The trial court sentenced Rivera to 40 years to life and a consecutive term of 10 years four months in state prison. The sentence consisted of: the midterm of eight years in count 2; a consecutive term of one-third the midterm, or 20 months, in count 1; one-third the midterm, or eight months, in count 6; and an indeterminate sentence of 15 years to life with a consecutive 25 years to life for the firearm enhancement pursuant to section 12022.53, subdivision (d) in count 7. The trial court stayed the sentence in count 3 pursuant to section 654, and it stayed the three prison priors.

The trial court sentenced Avalos to 15 years to life and a consecutive term of 10 years in state prison. The sentence consisted of: the low term of four years in count 2

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

and a consecutive low term of three years for the firearm allegation in that count under section 12022.5; one-third the midterm, or 20 months, in count 1; a consecutive one-third the midterm, or eight months, in count 5; one-third the midterm, or eight months in count 6; and 15 years to life in count 7. The trial court stayed the sentence in count 3 pursuant to section 654.

Rivera appeals on the grounds that: (1) there is insufficient credible evidence to support his conviction for assault by means of an assault weapon in count 2, (2) the evidence was insufficient as a matter of law that Rivera personally used a firearm under section 12022.53, subdivision (d) in the attempted murder, (3) the trial court's imposition of 15 years to life for the attempted murder was in error and should be reduced to life with the possibility of parole, and (4) the prison-prior sentences should be stricken and not stayed.

Avalos appeals on the grounds that: (1) there was insufficient evidence to support his conviction in counts 3 and 7, (2) there was insufficient evidence to support his conviction in count 2, and (3) the trial court's imposition of a term of 15 years to life in count 7 was unlawful. Avalos also joins in Rivera's contentions where they are applicable to him under California Rules of Court, rule 8.200.

FACTS

Prosecution Evidence

Counts 1 and 2 (Shooting at Laundromat and Assault on John Doe)

On October 16, 2005, at approximately 5:30 p.m., Ronald Earley (Earley) was sitting in his parked car in an alley parallel to Budlong Avenue between 105th and 106th Streets. He heard three gunshots and saw a young Black man jump over a fence, pursued by a man later identified as Avalos. Avalos was holding an AK-47. Avalos ran a short distance and then walked back to the mouth of the alley where a green car appeared. Avalos then turned the corner and left the alley in a westbound direction. The green car followed. Less than a minute later, Early heard more loud shots. When the firing stopped, Earley ran around the corner and saw that a Laundromat on 106th Street and Budlong Avenue had been "shot up."

Deputies Roman Foss, Jorge Juarez, Tony Leonard, and Christopher Lio arrived at the Laundromat at approximately 5:30 p.m. and saw shattered glass inside and out. Deputy Lio found 12 expended shell casings and one live round. The shell casings measured 7.62 by 39.

Count 6 (Church Sign Shooting)

On the same day, at approximately 5:40 p.m., Deputy Daniel Martin of the Los Angeles County Sheriff's Department, answered a call to the area of 94th Street and Budlong Avenue. He found two bullet holes in a church sign and recovered two expended rounds that were embedded in the sign.

Counts 3 and 7 (Assault Against and Attempted Murder of Hunter)

Shortly after the church shooting, at approximately 6:00 p.m., Hunter was shot in the area of Raymond Avenue and 111th Street. He testified that a Black man came toward him and shot him. As Hunter attempted to run away, the Black man shot him in the shoulder. When Hunter extended his right arm toward the shooter, he was shot in the hand. While Hunter knelt on the ground, the Black man shot him in the lower back. The shooter left, and Hunter yelled for help.

Deputy Eric Matias of the Los Angeles County Sheriff's Department responded to the scene and found Hunter being treated by paramedics. Hunter later underwent nine hours of surgery. Hospital staff gave Deputy Matias an expended bullet. At trial, the parties stipulated that a bullet removed from Hunter's pelvis was turned over to the Sheriff's Department.[2]

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[2] Hunter acknowledged prior convictions for grand theft auto, attempted grand theft auto, grand theft property, escape from prison, sale of cocaine, and burglary. At the time of trial, Hunter was incarcerated after being convicted of possession of cocaine for sale.

Count 5 (Evading Police)

The deputies who had responded to the Laundromat, heard gunshots ringing out from the southwest, which was the direction in which the scene of Hunter's shooting lay. This occurred within half an hour of their arrival. Deputies Foss and Juarez drove toward 111th Street and Budlong Avenue and the other two deputies followed. In a narrow street, Deputies Foss and Juarez who were headed west, passed Avalos and Rivera, who were traveling eastbound in a green Ford. Appellants appeared surprised and turned northbound on Budlong Avenue. The deputies made a U-turn and followed the green car.

As appellants drove rapidly through residential streets, Rivera threw what appeared to be a pistol from the passenger window to the sidewalk. Deputies Leonard and Lio, who were coming in the opposite direction, made a U-turn and retrieved a Smith and Wesson .38 revolver from the sidewalk and joined the pursuit. Deputies Foss and Juarez activated their lights and sirens, but appellants continued to accelerate and run through stop signs. At one point appellants crossed over a center island.

Near 109th Place, appellants crashed into a parked car and ran away. A civilian detained Rivera in the backyard of a house. Avalos jumped over a fence in the yard. A box of .38-caliber ammunition was recovered from Rivera's front pant pocket. Deputy Lio searched the green car and found an expended Wolf 7.62 by 39 casing under the driver's seat. Inside the car, police found an ATM card in Avalos's name and two registration cards—one in the name of Michelle Rivera and the other in the name of Alma Avalos.

Police erected a perimeter in the area and searched for Avalos. They found him a few hours later at a location one block from the collision site. Avalos was covered in blood, and he blew the blood on his face onto Deputy Leonard before being placed on a gurney. Avalos had been bitten on the left arm by a police K-9 dog.

Earley went to the crash scene and spoke with police. He described the man he had seen in the alley with the AK-47. In a field showup, he identified the man on the

gurney as the one holding the AK-47. Earley also identified Avalos as the man brandishing the AK-47 in a photographic lineup.[3]

Ballistics Evidence

Donna Reynolds (Reynolds), a firearms examiner on contract with the Los Angeles County Sheriff's Department, testified that the six expended shell casings found in the gun recovered from the sidewalk, the bullet recovered from Hunter, and the two bullets found in the church sign, all came from the Smith and Wesson revolver tossed out of the car by Rivera. The ammunition found on Rivera—the .38 special cartridges—was of the same caliber as the Smith and Wesson revolver. The examiner stated that all of the fired 7.62 by 39 cartridges found at the Laundromat shooting were fired by the same gun. All of these cartridges and the live bullet found near the Laundromat were of the same manufacturer and could fit an AK-47. A casing found on the floor of the green car on the driver's side matched the casings found at the Laundromat.

Defense Evidence

The parties stipulated that no gunshot residue was found on Avalos's hands after his arrest on October 16, 2005. Rivera did not present any evidence on his behalf.

DISCUSSION

I. Sufficiency of the Evidence Supporting Verdicts in Count 2 Against Both Appellants and the Verdicts in Counts 3 and 7 Against Avalos

A. Appellants' Arguments

Both appellants claim an insufficiency of the evidence in count 2, which was the assault by assault weapon (an AK-47) in violation of section 245, subdivision (a)(3) on John Doe. The John Doe in this case was the unknown male whom Earley saw running in the instant before he saw Avalos holding an AK-47 in his hands.

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[3] Earley acknowledged having suffered convictions for "possession" in 1983 and 1990, possession of a firearm in 1999, and grand larceny in 2003.

Avalos contends there was no evidence as to what occurred between him and John Doe. The only evidence about any relationship between them came from Earley's testimony, and that testimony provided no evidence of an assault by Avalos on John Doe. Because the inference that Avalos assaulted John Doe amounts to unlawful speculation, his conviction in count 2 must be reversed.

Rivera asserts there was no credible evidence to support a finding that Avalos assaulted John Doe with a deadly weapon or that Rivera aided and abetted this crime. Absent John Doe's testimony about the context in which he and Avalos happened to be in the alley, or testimony that Avalos had shot at him, Earley's observations were insufficient proof that Avalos was attempting to commit a violent injury on the person of another as required by section 245, subdivision (a)(3). Even assuming arguendo that Avalos committed the assault upon John Doe, there was insufficient evidence to tie Rivera to the crime as an aider and abettor, and his conviction must be reversed.

Avalos also contends there was insufficient evidence to support his convictions for assault with a firearm against Hunter and the attempted murder of Hunter. According to Avalos, it was abundantly clear that Avalos did not directly participate in the shooting of Hunter, which indicates he was found guilty as an aider and abettor in those counts. Driving the car with Rivera as a passenger on the evening of the shooting is the only action Avalos took that could be interpreted as aiding and abetting. Absent more, any inference that Avalos aided and abetted Rivera amounts to unlawful speculation, and Avalos's convictions in counts 3 and 7 must therefore be reversed.

B. Relevant Authority

On appeal we "review the whole record in the light most favorable to the judgment . . . to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 317.) We "presume[] in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.)

"The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt." (*People v. Mincey* (1992) 2 Cal.4th 408, 432.) "'The standard of review is the same in cases in which the People rely mainly on circumstantial evidence. [Citation.]'" (*People v. Abilez* (2007) 41 Cal.4th 472, 504.) "Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

"Although it is the jury's duty to acquit [appellants] if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the [appellants'] guilt beyond a reasonable doubt." (*People v. Kraft*, *supra*, 23 Cal.4th at pp. 1053–1054.) Our sole function is to determine if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*People v. Bolin*, *supra*, 18 Cal.4th at p. 331.)

Section 245, subdivision (a)(3) punishes "[a]ny person who commits an assault upon the person of another with . . . an assault weapon." Section 240 defines an assault as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (*People v. Colantuono* (1994) 7 Cal.4th 206, 214.) The criminal intent required for assault is established upon proof the defendant willfully committed an act that by its nature would probably and directly result in injury to another, i.e., a battery. (*Ibid*.) No actual touching is required to sustain a conviction under section 245, subdivision (a)(1). (*People v. Colantuono*, *supra,* at p. 219.) A general criminal intent to commit the act is sufficient to show the required mental state. (*People v. Golde* (2008) 163 Cal.App.4th 101, 109.)

"A person aids and abets the commission of a crime when he or she, (i) with knowledge of the unlawful purpose of the perpetrator, (ii) and with the intent or purpose of committing, facilitating or encouraging commission of the crime, (iii) by act or advice, aids, promotes, encourages or instigates the commission of the crime. [Citation.]" (*People v. Cooper* (1991) 53 Cal.3d 1158, 1164.)

C. Evidence Sufficient

We believe that there is sufficient substantial evidence in support of the jury's verdicts and findings on the charges from which appellants appeal. The evidence supports the theory that appellants were acting together, taking turns driving, and that they were therefore both guilty of each crime as either the perpetrator or the equally guilty aider and abettor. Because this is a reasonable hypothesis, it is not pure speculation, as urged by appellants. The jury reasonably concluded that appellants acted together and used a green car to go between certain points in the neighborhood of Budlong Avenue and 106th Street in order to carry out shootings of persons and buildings on October 16, 2005.

There were five incidents that occurred on the evening in question. Chronologically (according to the evidence), the first incident was the one witnessed by Earley, in which Avalos, the AK-47, and the green car were seen by Earley at approximately 5:30 p.m. Next, after Avalos made brief contact with the green car, the Laundromat around the corner from the alley was sprayed with bullets from an assault rifle, also at approximately 5:30 p.m. Within approximately 10 minutes, two bullets were fired into the marquee of the church on 93rd Street and Budlong Avenue. Approximately 20 minutes later, Hunter was shot three times at the intersection of 111th Street and Raymond Avenue. Lastly, the green car was seen near the scene of Hunter's shooting by police and followed. This caused the driver of the green car to lead the police on a dangerous chase and motivated Rivera to toss the handgun out of the car window. Avalos was seen during the first incident, and both appellants were seen and identified during the last incident. Ballistics and other circumstantial evidence tied them to the others. When the evidence obtained from each incident is compared to evidence from the others, a clear link between the incidents and the perpetrators is formed.

We believe Earley's testimony in conjunction with the evidence obtained from the Laundromat was sufficient evidence to support the jury's verdict that Avalos committed an assault by means of assault weapon on John Doe, the unidentified young Black male. The testimony of one witness, if believed by the trier of fact, is sufficient to sustain a

verdict. (Evid. Code, § 411; *People v. Young* (2005) 34 Cal.4th 1149, 1181.) "'If a trier of fact has believed the testimony . . . this court cannot substitute its evaluation of the credibility of the witness unless there is either a physical impossibility that the testimony is true or that the falsity is apparent without resorting to inferences or deductions. [Citations.]'" (*In re Andrew I.* (1991) 230 Cal.App.3d 572, 578.)

The jury accepted Earley's identification of Avalos and drew the reasonable inference that John Doe was running from Avalos when he jumped the fence from the alley shortly after shots were fired and just before Avalos entered the alley carrying an AK-47. Based on subsequent occurrences, the jury drew the reasonable inference that Rivera was driving the car that moved from the mouth of the alley at 106th Street toward Budlong Avenue just as Avalos did the same on foot, after stopping briefly at the green car. The intersection of 106th Street and Budlong Avenue was the exact location of the shooting at the Laundromat. Because the shooting at the Laundromat and its contents occurred "half a minute" after Avalos left the alley, the evidence found at the Laundromat scene was also probative on the assault against John Doe.

Deputy Leonard booked 12 casings and one live round found by Deputy Lio at the Laundromat shooting. These were 7.62 in size. The firearms expert compared the 12 casings in the caliber of 7.62 by 39 found at the Laundromat and determined they had been fired by the same weapon. A casing found on the driver's side of the green car matched the casings found at the Laundromat, and the expert examined that casing also. The expert stated it was of the same size and was fired by the same firearm as the 12 shots fired at the Laundromat. The casings and the live bullet from the Laundromat shooting and the casing from the car all fit an AK-47 or any variant of the AK and SKS type of rifles. Thus, the ballistics evidence links the first two incidents—the sighting of Avalos with the AK-47 and the Laundromat shooting—with the only occupants of the green car—appellants. (See *People v. Cooks* (1983) 141 Cal.App.3d 224, 279 [although no evidence showed which of two defendants shot the victim, there was substantial evidence both men were guilty of the crime when they were driving together on the night of shooting, the same gun used to shoot the victim was used by each defendant in other

shootings, and the shooting occurred within a few minutes of another shooting with same gun and within distance that could be covered in established time frame].)

Although Earley at first identified Avalos as Rivera in court, he stated under cross-examination that he was confused as to which of the two appellants in court was the man with the AK-47, but he was sure of his earlier photographic identification. In a photographic lineup on the day after the shooting, he identified the person brandishing the AK-47 as Avalos, whom he had also identified in a field showup the evening before. After stating his confusion, Earley approached the two appellants in court and then stated definitively that it was Avalos who had brandished the AK-47. "We cannot reject the testimony of a witness that the trier of fact chooses to believe unless the testimony is physically impossible or its falsity is apparent without resorting to inferences or deductions. As part of its task, the trier of fact may believe and accept as true only part of a witness's testimony and disregard the rest. On appeal, we must accept that part of the testimony which supports the judgment." (*In re Daniel G.* (2004) 120 Cal.App.4th 824, 830.) Therefore, there was sufficient evidence to support the verdicts with Avalos as the direct perpetrator and Rivera as an aider and abettor in the assault. The jury reasonably concluded that John Doe was running from Avalos when he "flew over" the fence immediately before Avalos appeared. Shots were fired just before John Doe and Avalos entered the alley. Rivera clearly knew Avalos's criminal purpose and facilitated the crimes by driving the car. (See *People v. Cooks*, *supra*, 141 Cal.App.3d at p. 279.)

As for the assault upon and attempted murder of Hunter, that shooting occurred only half an hour after the Laundromat shooting and 20 minutes after the shooting at the church sign, according to the testimony of Deputy Foss, Deputy Leonard, and Earley. They all heard shots coming from the southwest, where Hunter was found. Deputy Matias's testimony revealed that Hunter was actually shot at 111th Street and Raymond Avenue at approximately 6:00 p.m. This was near the spot where Deputy Foss first saw the green car when he was on his way to Hunter's location.

Deputy Matias went to the hospital where Hunter was taken, and a member of the staff handed him an envelope containing a bullet. The ballistics evidence linked the

bullet found in Hunter to the church-sign shooting that had occurred 20 minutes earlier and to the bullets found in Rivera's pocket. Rivera's attorney elicited that the call to the church-sign shooting had been an assault with a deadly weapon call, an "emergent" call, which means that appellants' argument that the bullets found in the church sign could have been fired at any time is to no avail.

The evidence obtained from the police pursuit also linked appellants to Hunter's shooting. On his way to the Hunter shooting scene, Deputy Foss yielded to the green Ford coming towards him with only appellants inside. He testified that appellants looked at him in surprise. Appellants turned left and proceeded northbound on Budlong Avenue, and Rivera tossed the handgun shortly after the turn. He was identified as the passenger by both Deputies Foss and Leonard. Deputy Leonard saw Rivera lean out of the car and throw out what appeared to be a gun. Deputy Leonard also booked the Smith and Wesson gun (People's exh. 9) that he recovered from the sidewalk on Budlong Avenue, and he identified the gun in court.

It is true that Hunter's testimony per se was of no use to the prosecution for identification purposes, but its very inconsistencies served to make his description of the shooter suspect. He at first stated, three times, that he did not see who shot him. He then stated that he saw one male Black shoot him. He insisted that he did not recall where he was when he was shot after stating he was shot while leaving a known drug house. After being admonished by the court, Hunter said he saw the shooter come toward him on 111th Street, and the shooter was moving westbound. He then stated he was shot at 4:00 p.m. He said he did not see the shooter in court, but he refused to look around the courtroom.

In addition, although Hunter stated he was not afraid to testify in the case, Hunter acknowledged that a Hispanic female visited him at his place of business as well as on the street and spoke with him in connection with the case. Someone also visited him while he was in jail. To the extent Hunter's testimony was self-contradictory, it was an issue of credibility for the jury. A jury is entitled to use the witness's demeanor and manner in assessing credibility. (See, e.g., *People v. Lewis* (2001) 26 Cal.4th 334, 361.)

"'"Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citations.]"' [Citation.]" (*Ibid*.)

We believe that the circumstantial evidence in this case rises far above the level of speculation. It is far more speculative to assert, for example, that Avalos may have picked up Rivera only at the end of the shooting rampage—just in time for Rivera to throw the gun out of the window, as Rivera asserts. It was reasonable to infer that each appellant acted as an aider and abettor in the crimes committed by the other and that they were therefore both guilty as principals. Substantial evidence supports the convictions, and appellants' arguments are without merit.

II. Sufficiency of the Evidence in Support of Rivera's Personal Firearm-Use Enhancement

A. Rivera's Argument

Rivera argues there was no evidence proving beyond a reasonable doubt that it was he who fired the gun used to shoot Hunter. He contends that, although it is likely the jury found suspicious the fact that Rivera threw the implicated revolver out of the car window and had bullets for the gun on his person, evidence that raises a strong suspicion is not sufficient to support a conviction. Rivera argues that the personal use allegation cannot stand and must be reversed.

B. Relevant Authority

As stated previously, "[t]he test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt." (*People v. Mincey*, *supra*, 2 Cal.4th at p. 432.) Our role is solely to determine if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*People v. Bolin*, *supra*, 18 Cal.4th at p. 331.) The same standard that applies to convictions applies to true findings on enhancement allegations. (*People v. Carrasco* (2006) 137 Cal.App.4th 1050, 1058.)

C. Evidence Sufficient

The firearms examiner, Reynolds, examined the Smith and Wesson revolver contained in People's exhibit 9, which was the gun tossed by Rivera. It originally contained six fired .38 special cartridge cases, which had been removed and labeled as People's exhibit 18. The casings were of the caliber that could be fired from the handgun. The live ammunition found on Rivera was of the same type as the six casings that came with the gun.

Reynolds test-fired the Smith and Wesson revolver and compared the two test-fired bullets and cartridge cases to the six bullet casings in People's exhibit 18 to the bullet in People's exhibit 19 that was extracted from Hunter. In addition, she compared them to the two bullets found in the church sign. Upon microscopic comparison, she concluded that all three bullets and all six of the fired cartridge cases were fired by the Smith and Wesson.

The ballistics evidence links the third and fourth incidents—the shooting of the church marquee and the shooting of Hunter—with the gun tossed by Rivera and the ammunition found on his person. The jury could therefore reasonably infer that it was Rivera who shot Hunter. The evidence provides support for the notion that Rivera and Avalos changed places in the car in the middle of their crime spree, probably at the church shooting scene. The timeline of the incidents shows that only one change of driver was necessary, which is not an unreasonable inference. We disagree with Rivera's assertion that "[w]hether appellant was in the passenger seat or not has no impact if the crime was not committed from the car," and Hunter did not say that the shooting was a drive-by. We believe it reasonable to infer that appellants' crime spree was carried out by having one of the two men stay at the wheel of the car while the other got out and shot at the target. Hunter's testimony indicated the shooter was on foot and shot Hunter the last time while Hunter knelt on the ground. Therefore, it is reasonable to infer that Rivera shot at the church marquee and at Hunter and that he therefore personally used a firearm in the latter crime. (See *People v. Cooks*, *supra*, 141 Cal.App.3d at pp. 278–279.)

III. Fifteen-to-Life Sentences in Count 7

A. Appellants' Argument

Both appellants argue that the correct sentence for an attempted murder is life with the possibility of parole, and their sentences of 15 years to life should be corrected. The People agree.

B. Discussion

Section 664 provides that attempted willful, deliberate, and premeditated murder shall be punished by imprisonment in the state prison for life with the possibility of parole. Appellants do not fall under subdivision (f) of section 664, which provides for a minimum term of 15 years in state prison for the attempted, willful, deliberate, and premeditated murder of a peace officer, firefighter, or custodial officer. Therefore, we must modify the judgment to correct appellants' unauthorized sentences in count 7. (*People v. Smith* (2001) 24 Cal.4th 849, 851–854.)

IV. Rivera's Prison Priors

A. Rivera's Argument

Rivera argues that the trial court clearly did not intend to increase his sentence with the three prison priors. Therefore, this court should order the priors stricken. The People argue that the matter must be remanded for resentencing.

B. Proceedings Below

At Rivera's sentencing hearing, the trial court stated, "The court will impose three years pursuant to 667.5(b) and will stay that three-year sentence."

C. Prison Prior Enhancements Must be Stricken

"Once the prior prison term is found true within the meaning of section 667.5 [, subdivision] (b), the trial court may not stay the one-year enhancement, which is mandatory unless stricken." (*People v. Langston* (2004) 33 Cal.4th 1237, 1241; *People v. Jones* (1992) 8 Cal.App.4th 756, 758.) Although the trial court erred in staying the enhancements in this case, we decline to remand for a new sentencing hearing. The record shows that the prosecutor did not include the prison-prior enhancements in the recommended sentence. The sentencing proceedings disclose that the prosecutor did not

argue against the trial court's decision not to include these one-year enhancements as part of appellant's sentence. The trial court's remarks seem to indicate it had not even considered imposing the three years for the enhancements. To remand under these circumstances would be to engage in a useless act. Accordingly, we conclude that in this case the proper course of action is to modify the judgment by ordering that the prison term enhancements be stricken (not stayed) in conformity with the decisions in *People v. Langston*, *supra*, 33 Cal.4th at page 1241, and *People v. Jones*, *supra,* 8 Cal.App.4th at page 758.

DISPOSITION

The judgments of appellants Avalos and Rivera are modified to amend their sentences in count 7 to life in prison with the possibility of parole. Rivera's judgment is also modified to strike the enhancements under section 667.5, subdivision (b). In all other respects the judgments are affirmed. The superior court is ordered to amend the abstracts of judgment to reflect these modifications and to forward copies of the amended abstracts to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

ASHMANN-GERST

We concur:

_____, Acting P. J.

DOI TODD

_____, J.

CHAVEZ